Petition

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

TRUMAN ROBERTS,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals for the Ninth Circuit err in holding that the Trial Court did not deprive the Petitioners of a fair trial by an impartial jury as provided by the Sixth Amendment to the Constitution?

sub-issues

(1) Were the Trial Court's rulings on evidentiary matters and misconduct so prejudicial as to warrant reversal by the Ninth Circuit Court of Appeals?

(2) Is the Trial Court's compliance with Rule 30, Federal Rules of Criminal Procedure and its proper charging of the jury essential to preserve the Petitioner's rights under the Sixth Amendment?

(3) Where the Government proves multiple conspiracies, must the Petitioner's request for severance be granted so

as not to violate the Petitioner's right to a fair trial?

II. Should the Court of Appeals for the Ninth Circuit have concluded that the Trial Court curtailed the Petitioner's Sixth Amendment right to notice of the nature and cause of accusation against him so that he may prepare a responsive defense and not be subject to double jeopardy in the event of a subsequent prosecution?

III. Did the Court of Appeals for the Ninth Circuit err in not finding that the Petitioner was deprived of his Sixth Amendment right to a fair trial based on the assertion that the Government did not prove beyond a reasonable doubt that the Petitioner was involved in a conspiracy and that the individuals transported were aliens?

IV. Should the Ninth Circuit Court of Appeals have concluded that the Petitioner was

denied his Fifth Amendment right to due process and his Sixth Amendment right to a fair trial by the Government's unilateral action of returning eye witness aliens to Mexico?

LIST OF PARTIES

The parties to the proceedings before the United States Court of Appeals For the Ninth Circuit and the United States District Court, District for Arizona, were:

United States of America, Plaintiff-Appelle
Idulfo Zavala-Pizano, Defendant-Appellant
Bill Gene Morgan, Defendant-Appellant
Truman Roberts, Defendant-Appellant
Gerald Wayne Dodson, Defendant-Appellant

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IN THE

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NO.

TRUMAN ROBERTS,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals For the Ninth Circuit entered in this case on March 30, 1981.

REFERENCE TO OPINIONS BELOW

United States Court of Appeals, For the Ninth Circuit, Memorandum opinion dated March 30, 1981. United States of America v. Idulfo Zavala-Pizano, et al., CA 80-1264, CA 80-1265, CA 80-1266, CA 80-1267 (9th Cir. Mar. 30, 1981)

STATEMENT OF JURISDICTIONAL GROUNDS

On April 1, 1980, Petitioner was found guilty by a jury of one count of Conspiracy To Transport Illegal Aliens in violation of 18 U.S.C. § 371 and three counts of Transportation of Illegal Aliens in violation of 8 U.S.C. § 1324(a)(2). On April 24, 1980, the United States District Court, District of Arizona, entered judgment and sentenced Petitioner to five (5) years imprisonment on each count, said sentences to run concurrently, and imposed a Ten Thousand Dollar ($10,000.00) fine on the one count of Conspiracy to Transport Illegal Aliens.

On March 30, 1980, the United States Court of Appeals, For the Ninth Circuit, entered its Memorandum Opinion affirming Petitioner's convictions (Appendix 1). On July 6, 1981, the United States Court of Appeals, For the Ninth Circuit, entered its Order denying Petitioner's Motion for Rehearing (Appendix 2). The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1) and U.S. Sup. Ct. Rule 7.1 (a), 28 U.S.C.

CONSTITUTIONAL PROVISIONS

Constitution of United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of proceedings in the case now before this Court. On April 1, 1980, in a cause then pending in the United States District Court for the District of Arizona, entitled UNITED STATES OF AMERICA v. IDULFO ZAVALA-PIZANO, BILL GENE MORGAN, TRUMAN ROBERTS, and GERALD WAYNE DODSON, Criminal No. CR-80-26-TUC-JAW(TEM), Petitioner TRUMAN ROBERTS was found guilty by a jury on an indictment of four counts charging violations of 18 U.S.C. § 371 and 8 U.S.C. § 1334(a)(2).

On April 24, 1980, the District Court entered judgment and Petitioner was sentenced to five (5) years imprisonment on each count to run concurrently and was fined TEN THOUSAND AND NO/ 100 DOLLARS ($10,000.00) on Count I. This judgment and sentence were affirmed by the Court of Appeals for the

Ninth Circuit, UNITED STATES OF AMERICA v. IDULFO ZAVALA-PIZANO, BILL GENE MORGAN, TRUMAN ROBERTS, and GERALD WAYNE DODSON, and not reported. Following his arrest, TRUMAN ROBERTS was released on a FIFTEEN THOUSAND AND NO/100 DOLLAR ($15,000.00) criminal property bond.

B. Relevant facts concerning the underlying convictions for the transportation of illegal aliens and conspiracy to transport illegal aliens. On January 29, 1980, the Petitioner was indicted along with fourteen other individuals, in the United States District Court for the District of Arizona. The Petitioner was charged in four Counts of the seven-Count indictment; Count I: conspiracy to transport illegal aliens; and Counts V, VI and VII: transportation of illegal aliens. Count I alleged a conspiracy which commenced on or about March 10, 1978, and continued up to May 31, 1979. Counts V-VII substantively alleged that ROBERTS and others transported numerous illegal aliens in

violation of 8 U.S.C. § 1324(a)(2).

The Government's case against the Petitioner rested solely on the testimony of immunized co-defendants and co-conspirators. It began with Government immunized co-conspirator John Henry (hereinafter referred to as Henry). (RT 162, 231-232). Prior to running loads of "aliens"[1] for the Petitioner, he had run loads for BILL GENE MORGAN (hereinafter referred to as MORGAN. (RT 200). He testified he ran numerous loads for the Petitioner beginning around March, 1978. (RT 208, 226). He described the people transported as Mexican-appearing individuals who spoke Spanish. (RT 219). Henry admitted that he was an alcoholic (RT 229); that he had been an alcoholic for twenty (20) years (RT 234), and that his recollection of dates was poor; stating that the dates he testified to could be several weeks off. (RT 225, 228). He further admitted that upon beginning to work for the

[1]The term "alien" is used for purposes of expediency and is not to be construed as an admission.

Petitioner he found that the loads were being delivered to locations and people who were different from those utilized by MORGAN. (RT 227).

David Anderson was the next Government-immunized witness to testify against the Petitioner. (RT 268). He testified that he ran numerous loads of "aliens". (RT 241-276). While he initially drove for MORGAN, he later drove loads for the Petitioner. (RT 252). He also testified that the individuals transported appeared to be Mexican and spoke Spanish. (RT 255, 267). Anderson's memory was no better than Henry's. His recollection of dates could be off as much as two weeks. (RT 273).

William Hall testified next for the Government. (RT 277). Hall was a co-defendant in the above-entitled action who had agreed to testify in return for dismissal of charges against him. (RT 277). He testified that on March 26, 1979, he wrote a check for TWO HUNDRED FIFTY DOLLARS ($250.00) to Cactus

Recreational Vehicle Rental (RT 278-279) and that night he and Henry picked up a load of "aliens" and left for Chicago. (RT 279). He stated he believed there were twenty-eight (28) or twenty-nine (29) individuals in this group. (RT 281). Henry, on the other hand, describing the load he drove with Hall, said there were about twenty (20) individuals. (RT 215-216). Henry further identified this trip by stating the motor home was rented from Cactus Recreational Vehicle Rentals (RT 215), which coincides with Hall's testimony. (RT 277-279). Hall stated that this load went to Chicago (RT 279), while Henry testified it went to Idaho. (RT 216). The indictment, on the other hand, (Count VI), alleges that the crime took place on or about March 28, 1979, and that there were approximately thirty-six (36) "aliens" transported.

William Weisel (hereinafter referred to as Weisel), an immunized co-defendant, followed. In return for testifying, the Government agreed to allow him to plead guilty to a mis-

demeanor charge. (RT 314). He testified he drove a number of loads for MORGAN (RT 297-298) and later, for the Petitioner. (RT 313). He further testified that around February or March of 1979, he drove a load of twenty (20) "aliens" from Arizona to Idaho for the Petitioner. He described the individuals as Mexicans, speaking Spanish. (RT 311). Only one more trip was made by Weisel for the Petitioner, and that was to Rupert, Idaho. (RT 313). This ended the testimony of immunized co-defendants and co-conspirators against the Petitioner.

Agents Roger Drahos and James Johnson testified to the seizure of twenty-nine (29) "aliens" and the arrest of Jodene Carnes, the substance of Count VII. On April 29, 1979, the above agents, having been previously alerted to a potential smuggling of "aliens" by Robert Osheim, owner of Cactus Recreational Vehicle Rentals (RT 476), staked out the suspected vehicle. After several moves, the vehicle proceeded northbound on Highway 82.

(RT 373). The vehicle was stopped by a sheriff's deputy at the border patrol agent's request (RT 375), and upon arriving, the agents opened up the vehicle door and found it occupied by twenty-nine (29) individuals from Mexico. (RT 375). Agent Drahos testified over objection, that he did not find any citizenship papers on any of these individuals. (RT 380-382). Jodene Carnes, a co-defendant whose matter was severed from this trial, was thereupon arrested. (RT 383).

The Government's final witness was Agent Lough. He testified that he has been an I.N.S. agent for approximately twenty-four and one-half (24 1/2) years. (RT 437). He identified IDULFO ZAVALA-PIZANO (hereinafter referred to as ZAVALA) (RT 437) as an individual whom he has surveilled at least several times per week during the period from August 1978 through March 1979. (RT 441). During this period of time: (1) he has seen ZAVALA and the Petitioner together on one occasion (RT 443); (2) he observed none of the Govern-

ment's immunized witnesses with ZAVALA (RT 443-444); (3) he observed no illicit activity going on between the Petitioner and ZAVALA (RT 444); (4) he observed no others in their presence who were known to him as smugglers (RT 444); (5) he observed no recreational vehicles in the area (RT 444); (6) he observed no one who was later named as a driver for ZAVALA or the Petitioner (RT 446); (7) he knew the Petitioner was in the landscaping-roofing business (RT 447-448); (8) he was not aware that ZAVALA was employed by the Petitioner in his landscaping business (RT 447); (9) at no time had he observed the Petitioner driving a recreational vehicle (RT 448); and all of this in spite of his frequent surveillance of ZAVALA and weekly surveillance of the Petitioner. (RT 444).

This concluded the Government's case against the Petitioner.

ARGUMENT

I

"DID THE COURT OF APPEALS FOR THE NINTH

CIRCUIT ERR IN HOLDING THAT THE TRIAL COURT DID NOT DEPRIVE THE PETITIONER OF A FAIR TRIAL BY AN IMPARTIAL JURY AS PROVIDED BY THE SIXTH AMENDMENT TO THE CONSTITUTION?

(1) Were the Trial Court's rulings on evidentiary matters and misconduct so prejudiced as to warrant reversal by the Ninth Circuit Court of Appeals?

The following discussions should be taken collectively. Although each separate area may, in and of itself, be grounds for reversal, when taken collectively, they make a compelling argument for reversal.

(A) Unrestricted use of the word "alien" by Government witnesses over defense counsel's objections.

Throughout the trial, the trial court allowed Government witnesses to use the word "aliens" over counsel's objections. (RT 77, 106, 189, 204, 294, 322-323) without requiring the necessary foundation for expert testimony. The fact that some co-defendants or accomplices may have referred to the individuals transporte

as "'aliens', wets' and 'wetbacks' (RT 91, 131, 167, 183)", does not alleviate the necessity of laying the proper foundation for use of the terms. The Petitioner was especially prejudiced by the unrestricted use of these terms since none of the witnesses who testified against him testified that these terms or similar terms were used in reference to loads of "aliens" sponsored by the Petitioner. In this regard, the trial court transcript deals solely with the testimony of: (1) Keith Elsworth who testified against TED EISENHART (hereinafter referred to as EISENHART) and MORGAN (RT 91,131); and (2) Henry who was testifying against MORGAN when he referred to the individuals as "wets" (RT 165-167) and "wetbacks" (RT 181-183). At no time did any witness refer to the transported individuals as "wets", "wetbacks", or "aliens" while testifying against the Petitioner. The Petitioner would respectfully submit that the Trial Court's rulings allowing for the unrestricted use of the aforementioned terms

without requiring the necessary foundation for expert testimony were erronious and prejudicial. The Trial Court did not require any foundational qualification for witnesses to use these words. The constant use of these words clearly prejudiced the Petitioner since it negated the need for the Government to prove one essential element of the crime the Petitioner was charged with; to wit: alienage.

Furthermore, assuming the above testimony was proper, it could not be used against the Petitioner because the witnesses gave such testimony on the Government's case against those other than the Petitioner. However, in light of the fact that the Petitioner was charged with the same type of crime and that his case had not been severed, as had been moved by the Petitioner, he was additionally prejudiced. The jury could easily impute the above-mentioned testimony into the case of the Petitioner thus further prejudicing his case and depriving the Petitioner of a fair

trial by an impartial jury.

(B) Did the Trial Court err to the Petitioner's prejudice by not allowing counsel to approach side-bar to argue legal matters?

Throughout the trial, the Trial Court refused to allow counsel to approach the side-bar to argue legal matters or objections. The net effect of this was to have a "chilling effect" on counsel making objections to the court or making a "record of error" by the Trial Court since such had to be argued before the jury. (RT 7, 16, 52, 81, 235, 243, 333). The instances of judicial misconduct in not allowing side-bar conferences all clearly show that the Defendants were severely prejudiced in having to argue legal matters before the jury. There were all too many instances where counsel did not voice their objections since to do so would mean that sensitive and prejudicial matters would be brought to the attention of the jury. This had a "chilling effect" on defense counsel's voicing of objections, clearly to

the detriment of their clients.

One example referred to occurred when Mr. Rempe asked to approach the side-bar because he felt the Government was proving a separate and distinct conspiracy. When the Trial Court refused to allow a side-bar conference, Mr. Rempe was forced to argue before the jury. He made his argument and was quickly overruled by the Court (RT 52). This worked against all the Defendants because the jury heard the judge, in overruling the objection, tell Mr. Rempe that he did not accept the argument of separate conspiracies. The other instances of judicial misconduct in not allowing side-bar conferences (RT 7, 16, 81, 224, 235, 243, 333) all clearly show that Defendants were severely prejudiced in having to argue legal matters before the jury.

The Trial Court's manner in which the above matters were conducted shows its clear preference for the Government's case and places the defendants in an unfavorable light before the jury. This behavior by the Trial Court

may have influenced the jury to the extent that it would not be possible for it to disregard the Trial Court's prejudice and make a wholly unprejudiced decision of its own.

(C) Did the Trial Court exceed the bounds of fair play by improperly chastising counsel in front of the jury?

During cross-examination by the Petitioner's counsel of Henry, Jose Jurita's counsel objected. It appears that the Trial Court did not clearly hear his objection and, therefore, assumed that he had spoken out of turn. The Trial Court proceeded to ridicule the attorney in front of his client and the jury. (RT 274). This clearly showed the Trial Court's contempt not only for defense counsel but, when combined with other acts of judicial misconduct, for all the defendants as well. The Trial Court, throughout the trial, made its feelings towards defense counsel and the Defendants well known to all parties concerned.

(D) Did the Trial Court commit reversible error by attesting to the veracity of Government witnesses?

DODSON'S counsel had just begun to cross-examine the only witness against his client when the Trial Court sharply curtailed his examination by lending veracity to the witness:

> "THE COURT: Please counsel, you have a copy of the Grand Jury minutes of a hundred and something pages in which this man is alleged to have testified truthfully, right? Is there any question in your mind as to whether he told the truth to the Grand Jury about his name and address, and then what he said yesterday to this jury." (RT 81) (Emphasis added)

Clearly, this comment was unjustified and improper. The Trial Court is charged with the responsibility of conducting the trial in a fair and impartial manner. United States v. Trapnell, 512 F.2d. 10 (9th Cir. 1975). The Petitioner would respectfully submit that the Trial Court's action in attesting to Danielson's veracity was highly improper and prejudicial.

The next such incident occurred when Mr. Cole was about to testify. DODSON'S counsel objected on the grounds that George Cole had been sitting in court, listening to Ellsworth testify. The Petitioner's counsel notified the Trial Court that Cole had been there listening for some period of time. (RT 236). This was borne out by Jose Zurita's counsel, Mr. Axelrod, who estimated that Cole had been listening for thirty-five (35) to forty (40) minutes. (RT 236) Agent Lough, on the other hand, told the Court that he escorted Cole out as soon as he saw him "coming through the door". (RT 236). Yet, when asked how long a period of time expired before Mr. Cole was escorted out, this twenty-four and one-half (24 1/2) year veteran estimated the time as "less than a few minutes".

The most important point to be made here is that all this took place before the jury since the Trial Court would not allow counsel to approach side-bar. (RT 235). Because

this took place before the jury and because the Motion to Exclude Cole's testimony was denied before the jury, judicial support and credence was advanced to Mr. Cole, Agent Lough, and the Prosecutor. Such not only was unfair but prejudicial as well: three counsel were made out to be liars.

(E) Did the Trial Court commit reversible error by allowing EISENHART'S counsel to read a Stipulation between himself and the Government to the jury, which Stipulation confirmed beyond a reasonable doubt two essential elements of the crime and which Stipulation was objected to by co-counsel?

EISENHART'S counsel and the Government entered into a Stipulation that the jury would be instructed as follows:

> "That all of the witnesses agree that they were picked up right after crossing the international boundary by the motor home with the same person driving as when they were arrested near Kearney, Nebraska." (RT 536) (Emphasis added)

This statement clearly establishes alienage of the individuals transported since it is

given to the jury "as fact". Since the individuals were always picked up according to the Government's witnesses' testimony, in the early morning hours, it is now given as fact that they all crossed the international boundary just prior to being picked up. It further establishes the element that the aliens' last entry was within three years, a fact which was to have been proved by the government beyond a reasonable doubt. It should be noted that the Government offered absolutely no evidence in this regard throughout the trial. This alone should be sufficient to reverse this matter since it was extremely prejudicial and it improperly lessened the Government's burden.

Arguably none of the above assertions of error, with the exception of the Court's procedure regarding instructions and the Stipulation between the Government and Eisenhart's counsel, would alone dictate reversible error, the Petitioner respectfully submits that all of the above when taken in

conjunction with the Trial Court's manner of addressing and questioning counsel, acknowledging and denying objections, attesting to Government witnesses' credibility, relying on oral motions before the jury, instructing the jury, and its general demeanor to defense counsel and to Defendants, clearly portraying the Court's feelings to the jury, mandate reversal.

In addition, the Government never brought forth any evidence against the Petitioner regarding the alienage of those who were picked up nor when their last date of entry was.

As a consequence of the above, the Petitioner's constitutional right to a fair trial by a fair and impartial jury was violated: refersal is mandated.

(2) "Is the Trial Court's compliance with Rule 30, Federal Rules of Criminal Procedure and its proper charging of the jury essential to preserve the Petitioner's rights under the Sixth Amendment.

Rule 30, Federal Rules of Criminal Procedure, provides that parties may submit proposed jury instructions prior to the Court charging the jury. It further provides that the "court shall inform counsel of its proposed action upon the requests". In the instant case, the Trial Court did inform counsel of its proposed action. (RT 561-565). The court agreed to give "in substance" approximately twenty-eight (28) out of forty-two (42) instructions submitted for consideration. The Trial Court at no time supplied counsel with its final form of charge. In instructing the jury, the court proceeded to rearrange the Petitioner's instructions, shortening most of them beyond recognition. Furthermore, the court totally left out a number of others and in other instances proceeded to give instructions which were totally unintelligible and contrary to law (eg. Conspiracy). Some of these allegations will now be considered in detail.

The Petitioner respectfully submits that

when the Trial Court concluded instructing the jury, the jury was left with a confusing compillation of instructions in which the elements essential to a fair trial were totally lacking. In addition, the Trial Court's instructions, when taken as a whole, indicate a definite bias for the Government. The instructions as given were prejudicial.

(A) "CONSIDER EACH COUNT SEPARATELY"

The Petitioner's requested instruction number "1" (ER 29) instructed the jury that it must consider each count separately. A similar instruction was approved in United States v. Parker, 432 F.2d 1251 (9th Cir. 1970). The Trial Court had indicated that this instruction would be given. (RT 561). However, the only reference in this regard was as follows:

> "When I finish my charge and you retire to the jury room, you must unanimously determine whether or not each defendant, Idulfo-Zavala Pizano, Bill Gene Morgan, Truman Roberts, Ted L. Eisenhart, and Gerald Wayne Dodson is guilty or not guilty of the particular crimes of which each is accused.

> The law requires the case against each defendant must be considered as separately, one from the other, not jointly or collectively." (RT 575-576).

It should be noted that in the above-quoted instruction the Trial Court did not at any time inform the jury that each charge and the evidence pertaining to it should be considered separately, this being the exact purpose for the instruction. Here, the Trial Court did not do as was done in Glenn v. United State 406 F.2d 658 (D.C. Cir. 1968), wherein that Court informed the jury that "it could find appellant quilty on both counts, not guilty on both, or guilty on one count and not on the other." Glenn, supra, 406 F.3d at 659. This portion of the quoted instruction was approved and because of this, the Court held that the counts were not impermissibly linked.

This, however, is not true in the case at bar. The counts in the case at bar are distinquishable only by the date on which the events allegedly took place. The jury could easily have linked the counts together and

found that the evidence tending to support one particular count was sufficient to support conviction on the second. This is especially true in the case at bar since the witnesses were unclear as to specific dates. The Government in the instant case proved over thirty (30) separate and distinct crimes where only five were charged.

The Court can assume that the jury did not confuse the issues or law only if it has been properly instructed. United States v. Parker, 432 F.2d 1251 (9th Cir. 1970). In the instant case, the jury was not properly instructed. When the Trial Court's instruction is taken in conjunction with the other instructions given, and the fact that multiple counts and numerous defendants were involved, only one result can be reached: the Trial Court erred in its instruction to the prejudice of the Petitioner.

(B) "CONSIDER EACH DEFENDANT"

The Petitioner's requested instruction number "2" (ER 30) deliniates the care with

which the jury is instructed to consider the case against each defendant individually. This instruction was approved in United States v. Robinson, 545 F.2d 301 (2nd Cir. 1979). This instruction is particularly important in a conspiracy case such as the one at bar. United States v. Calabro, 449 F.2d 885 (2nd Cir. 1971). Again, the Trial Court agreed to give this instruction but the instruction actually given to the jury was very different. In this regard the Trial Court stated as follows:

> "The law requires the case against each defendant must be considered as separately one from the other, not jointly or collectively, but separately." (RT 586)

As to the conspiracy charge, the Trial Court charged the jury:

> "In determining whether any defendant was a party, each is entitled to individual consideration of the proof respecting him, including any evidence of his knowledge or lack of knowledge, his status, his participation in key conversations, his participation in the plan, scheme or arrangements that are alleged." (RT 586)

The Trial Court eliminated language in the

proposed instruction charging the jury not to consider and evidence admitted solely against another defendant.

The Petitioner respectfully submits that this proposed instruction was crucial in that he was not charged in all counts. When the jury was instructed of the charges against the Petitioner (RT 577), the Trial Court did not instruct the jury that it could not consider evidence admitted solely against another defendant or defendants. In addition, the Petitioner would respectively submit that the instruction given by the Trial Court, as quoted above, was incomprehensible and was not in conformance with the law in this Circuit. Such is prejudicial error.

(C) "BURDEN OF PROOF - REASONABLE DOUBT"

The Petitioner's requested instruction number "3" (ER 31) concerned the Government's burden of proof and a definition of "reasonable doubt". It was substantially approved by this Court in United States v. Cummings, 468 F.2d 274 (9th Cir. 1972). Again, the Trial Court

agreed to give this instruction but proceeded to give only portions of it. For example, nowhere did the Trial Court instruct the jury that "the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence or lack of evidence in the case." It should be noted here, that this phrase was approved in Cummings, supra. Nor, did the Trial Court instruct the jury that a defendant is never to be convicted on mere suspicion or conjecture. Additionally, the Petitioner would bring to this Court's attention that the Trial Court at no time instructed the jury that "the burden of proof never shifts to a defendant" and that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. In fact, the Trial Court inferred just the opposite when the Trial Court gave its instruction on the

availability of the subpoena power to both parties. (RT 592-593).

Clearly, the Petitioner was severely prejudice in the Court's failure to give the instruction as submitted.

(D) "TESTIMONY OF IMMUNIZED WITNESS"

The Petitioner's requested instruction number "11" dealt with the testimony of immunized witnesses. (ER 41). This instruction charges the jury to scrutinize the testimony of an immunized witness more carefully than that of an ordinary witness since it could be affected by interest or prejudice against defendant. It further instructs the jury that such testimony may be colored in such a way as to further the immunized witness' own interest in procuring his own freedom and that such testimony is to be received with caution and considered with "great care".

The Trial Court's charge as to immunized witnesses read as follows:

"Now, a number of the government's

> witnesses admitted participation in the crimes charged in this indictment; others have received immunity from prosecution and have testified under that immunity. The government frequently must use testimony like that, because otherwise, it would be difficult or almost impossible to detect or to prosecute wrongdoers." (RT 590-591)

The only reference that the Trial Court made to the weight to be given such testimony was the last sentence of the above quotation which states that the jury must weigh such testimony with caution and scrutinize it carefully. It has been repeatedly held that it is reversible error to not give a cautionary instruction regarding accomplice or governmental informer testimony if requested. United States v. Garcia, 528 F.2d 580 (5th Cir. 1976); United States v. Busby, 484 F.2d 994 (9th Cir. 1973). Contrary to the situation in Busby, supra, wherein the Court gave a detailed credibility instruction, the Trial Court's credibility instruction herein is not detailed at all (RT 589-590). No reference at all was made in the charge to the personal advantage an immunized witness could gain

from testifying or the interest in the ability of such a witness to color his testimony in order to further his own interests. In short, the Trial Court did not explain the reasons why such testimony should be scrutinized with "caution and care".

The Trial Court's failure to provide the jury with any basis for careful scrutinization of such witnesses' testimony is especially prejudicial in view of the Trial Court's statement that "the government frequently must use testimony like that, because otherwise, it would be difficult or almost impossible to detect or to prosecute wrongdoers." (RT 590-591). This becomes especially crucial when one considers that all of the witnesses who testified against the Petitioner were witnesses who fell into the category of this instruction. Without an explanantion to the jury of the reasons why such testimony is suspect, this gratuitous phrase implicitly approved and lent credence to the co-conspirators' testimony in this case. Use of a

statement such as this in the absence of a discussion as to the motive to falsify, such as that approved in United States v. Corcione, 592 F.2d 111 (2nd Cir. 1979), results in prejudicial error where, as here, the government's entire case with regards to the Petitioner rested upon the testimony of immunized witnesses.

(E) "ABSENCE OF WITNESS"

The Petitioner's requested instruction number "19" (ER 49) is a "missing witness" instruction. This instruction was approved in United States v. Bautista, 509 F.2d 675 (9th Cir. 1975). The Trial Court agreed to give this instruction but instead gave an instruction of its own:

> "Now, during summations there was some reference to why wasn't a certain witness called, or where was this witness, or should have called him. In a Federal criminal trial, both the defendant and the government are entitled to receive from the Clerk of the Court a subpoena calling for attendance of the witness, and no matter where that witness lives in the United States, he is required to appear when served with such a subpoena. Now, if X, Y, or Z could have been called by either side as a witness, so

> that from the failure of either side to call him or them, you may infer that his or her testimony might have been unfavorable to either the government or the defendant, but it is equally within your discretaion to draw no inference at all from the failure of the government to call X or Y or Z." (RT 592-593)

The Trial Court refused to instruct the jury that no conclusion should be drawn regarding a witness equally available to either side. In a case where the defense had called witnesses, the omission would not be crucial. However, as here, where the defense produced no witnesses and where the "aliens" were unavailable to both sides, the clear onus of this instruction was that the absence of a witness should be construed against the defense. Upon a proper request, it is error to refuse to instruct the jury that they should draw no inference from the absence of a witness unavailable to either side. Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970).

Also, at this juncture in the instructions, it was essential that the Trial Court remind

the jury that the law never imposes upon a defendant the burden of calling any witnesses or producing any evidence. Instead, the Trial Court left the jury with the impression that any missing witness could be construed against the defense. This is error for it is elementary that a defendant need not produce witnesses and failure to produce witnesses must not be construed against him. The entire burden is upon the Government and not upon the defendant. It should be noted here that the very last sentence in the Court's charge to the jury, the Court slanted the charge in favor of the Government. This clearly was erroneous.

(F) "JUDGING THE EVIDENCE"

The Petitioner's requested instruction numbered "35" (ER 66) referred to the jury's role in judging the evidence. While the Trial Court gave portions of this instruction (RT 576-577), parts were eliminated. The Petitioner respectfully submits that the Trial Court's charge did not properly instruct

the jury that the law does not impose upon a defendant the burden or duty of calling any witnesses or producing any evidence.

(G) "KNOWLEDGE AN ESSENTIAL ELEMENT OF THE OFFENSE"

The Petitioner's requested instruction numbered "36" (ER 67) charged that "actual knowledge" was an essential element of the offense. In this case, actual knowledge was a requirement of both the conspiracy and substantive Counts. The Trial Court charged that each defendant must have "knowingly and purposely" entered into the conspiracy. At no time did the Court say that actual knowledge was required. Instead the Trial Court defined knowledge as "a matter of inference from the facts that are proved." (RT 583). With regard to the substantive crimes, the Trial Court stated that "an act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertance or other innocent reason". (RT 592, 599). The Trial Court's failure to inform the jury that

actual knowledge was required is, defendant would respectfully submit, prejudicial error in view of the Court's confusing instruction on conspiracy and related charges. Reisman v. United States, 409 F.2d 789 (9th Cir. 1969).

The Court totally misled defense counsel by acknowledging that it would give certain instructions and then, without any prior notice to Defendant's counsel, giving portions of said approved instruction while in some cases refusing or neglecting to give others which had already been approved. Without being supplied a copy of the Court's proposed instructions to the jury, defense counsel were at a distinct disadvantage of trying to interpret what the Court was saying and at the same time determining whether or not it had followed its own approved instructions. This was physically and humanly impossible. When the Petitioner's counsel attempted to make some specific and detailed objections to the Court's instructions the Court proceeded to cut him off. Counsel specifically objected

to the above described instructions given by the Trial Court.

After making these objections known, the Trial Court stated:

> "Counsel, you have an exception for all of the instructions you give me in writing that I didn't give. . ." (RT 598; see also RT 595-597).

The Court, in United States v. Goodman, 457 F.2d 68 (9th Cir. 1972), approved the practice of incorporating objections previously made. Here, the Trial Court had stated it would give some twenty-eight (28) out of forty-two (42) of Petitioner's proposed instructions (RT 561-566). At no time prior to actually doing so, did the Trial Court inform counsel that the Court was going to substantially alter each of the approved instructions. Under these circumstances, clearly, any variation by the Trial Court from the approved proposed instructions would not have to be objected to on an individual basis. See: Las Vegas Merchant Plunbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954); United

States v. Lyles, 593 F.2d 182 (2nd Cir. 1979).

Defense counsel's objections were adequate under the circumstances. The Trial Court's practice in first leading counsel to believe that instructions would be given, only to "prune" substantial portions of some and leave out others completely, was inherently unfair and in violation of the spirit of Rule 30, Federal Rules of Criminal Procedure. This, coupled with the inadequate and erroneous instructions given, warranted reversal.

(3) Where the Government proves multiple conspiracies, must the Petitioner's request for severance be granted so as not to violate the Petitioner's right to a fair trial?

Prior to trial, the Petitioner filed a Motion for Severance (CR 133), setting forth a number of reasons which he felt mandated severance under Rule 14, Federal Rules of Criminal Procedure. The Trial Court denied said Motion, (CR 157). The Petitioner made further unsuccessful requests for severance during the trial. (RT 527)

The Petitioner now alleges that the Trial Court's failure to grant a severance precluded him from enjoying his constitutional right to a fair trial. While the Petitioner realizes that ordinarily severance is a matter of judicial discretion and that the burden of demonstrating prejudice rests with the defendant, Opper v. United States, 348 U.S. 84, 95 (1954), he respectfully submits that his rights to a fair trial were seriously compromised by being forced to trial with the five (5) co-defendants. The Petitioner maintains that a careful review of the evidence presented at his trial demonstrates the existence of two (2) totally separate and distinct conspiracies; (one of which involved ZAVALA, MORGAN, DODSON and ZURITA, and the other involving the Petitioner himself) thus necessitating reversal of his conviction based on Kotteakos v. United States, 328 U.S. 750 (1946). The oft-cited Kotteakos decision held that it was not "harmless error" to jointly try and convict multiple defendants

on the charge of a single conspiracy when multiple conspiracies have been demonstrated and proven.

In the case at bar, the Government cannot persuasively argue that the Petitioner, ZAVALA, MORGAN, EISENHART and ZURITA were all engaged in a single conspiracy, at least not based upon their witnesses' testimony.

Joinder of defendants is governed by Rule 8(b), Federal Rules of Criminal Procedure. This Rule allows joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the offense or offenses: Inherent in Rule 8(b)'s restriction of joinder of defendants involved in the same act or transaction or the same series of acts or transactions is the principle that defendants charged with unrelated offenses may not be indicted and tried together Rather, there must exist some link among all defendants before joinder is proper. Ingram v. United States, 472 F.2d 567 (4th Cir.

1959). Consequently, in United States v. Gougis, 374 F.2d 758 (7th Cir. 1967), reversal of defendant's conviction was compelled on the grounds that joinder of defendants was improper when no evidence connected defendant Gougis to certain counts involving only his co-defendants.

In United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976), cert. denied 97 S.Ct. 1691 (1977) the Fourth Circuit held that:

> "The burden is on the Government to show that persons to be joined participated in the same act or transactions, or in the same series of acts or transactions. Although there was a 'series' of transactions involving a common denominator. . ., the Government did not meet its burden or proving that there was any connection between appellant's offense and (his co-defendant's) offense. Carried to its logical conclusion, the Government's theory might well allow us to join in a common indictment and trial two delinquent taxpayers who used the same accountant. Such a result approaches the ridiulous." 539 F.2d 1023, 1025.

The same is true in the case at bar. The Petitioner would respectfully submit that the evidence adduced at this trail demonstrates without question the existence of two (2)

separate conspiracies: the Petitioner on the one hand, and ZAVALA, DODSON, MORGAN, EISENHART and ZURITA on the other. The Government failed totally to connect the Petitioner with any of the co-defendants in any criminal activity. None of the Government's witnesses testified that both the Petitioner and ZAVALA or MORGAN or DODSON or EISENHART or ZURITA were ever involved in any combined criminal activity. (Of the individuals indicted, only ZAVALA, MORGAN and the Petitioner were supposed to have been instrumental in sponsoring loads.)

While several drivers testified that they ran loads for MORGAN and for the Petitioner (RT 297, 313-WEISEL) (RT 200, 221-HENRY) (RT 246, 252-ANDERSON), none of these witnesses ever testified that there was a connection between the two. In fact, HENRY testified that when he began running loads for the Petitioner, he never again saw ZURITA (RT 227), who had been a common figure during the "MORGAN" runs. He made it absolutely clear

that the "ROBERTS" runs involved different locations and different people. (RT 227). The mere fact that several of the "professional" alien smuggling drivers happened to make runs for both the ZAVALA organization and Petitioner certainly does not supply the thread with which the Government hopes to tie together the two criminal ventures into one conspiracy. United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976).

When the Trial Court's actions are taken in their entirety, one must come to the inescapable conclusion that the Trial Court was prejudiced against the Defendants and their counsel. It has been demonstrated that throughout the trial, the Court abused its discretion on matters of evidence and general court conduct. These actions were certain to have an affect on the jury swaying them to the side of the Government. The Trial Court further prejudiced the Defendants' case in not abiding by Rule 30, Federal Rules of Criminal Procedure. The jury instructions

were grossly inadequate and did not sufficiently inform the jury on what it was to base its verdict. In addition, the Trial Court's procedure in this regard took the Defense ccunsel by surprise, rendering them unable to rectify the situation. Furthermore, the Trial Court's demeanor in chastising and cutting off counsel, not allowing side-bar conferences and commenting on the veracity of Government witnesses while questioning the word of Defense counsel could only have a "chilling effect" on Defense counsel in their case presentations while further impinging on the impartiality of the jury.

Finally, because the Trial Court refused the Petitioner's request for severance, the Petitioner, in the eyes of the jury, committed the same acts as the other defendants, and was susceptible to the same evidence presented by the Government in its case against the other defendants. This severely prejudiced Petitioner and amounted to guilt by association. The Government put on no

evidence linking the Petitioner with the other defendants.

Consequently, the jury was so prejudiced by the actions of the Trial Court that it was patently unable to reach a fair verdict in a fair, just and unbiased manner.

II

SHOULD THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAVE CONCLUDED THAT THE TRIAL COURT CURTAILED THE PETITIONER'S SIXTH AMENDMENT RIGHT TO NOTICE OF THE NATURE AND CAUSE OF ACCUSATION AGAINST HIM SO THAT HE MAY PREPARE A RESPONSIVE DEFENSE AND NOT BE SUBJECT TO DOUBLE JEOPARDY IN THE EVENT OF A SUBSEQUENT PROSECUTION?

Counts V, VI and VII allege that the Petitioner, along with other co-defendants, transported a specific number of illegal aliens in violation of 8 U.S.C. § 1325 (a)(2). It should be noted that this section makes it a crime to transport "any alien" and provides that upon conviction said person "shall be punished. . . for each alien in respect to

whom any violation of the subsection occurs. . ." It appears obvious that Congress fully intended each illegal transportaion of each alien was a separate and distinct crime. Vega-Murrillo v. United States, 247 F.2d 735 (9th Cir. 1957).

Prior to trial, the Petitioner advanced the argument by pretrial motion that the above-noted substantive Counts, in that each Count alleged numerous aliens were illegally transported, were duplicitious. (CR 129). This Motion, along with all others filed on behalf of the Petitioner, was denied. (CR 157).

Rule 7(c)(1), Federal Rules of Criminal Procedure, states that "The indictment. . shall be a plain, concise and definite written statement of the facts constituting the offense charged."

Rule 8(a), Federal Rules of Criminal Procedure, prohibits the joinder of separate offenses in a single count for the specific purpose of previnting "duplicity". Overstreet v. United States, 321 F.2d 459 (5th Cir.

1963). Duplicity involves the joining of two or more distinct and separate offenses in one count. United States v. Tanner, 471 F.2d 128, 138 (7th Cir. 1972). The prohibition against duplicity, under Rule 8(a), Federal Rules of Criminal Procedure, is designed to:

(1) Protect a defendant's rights under the Sixth Amendment to notice of the nature and cause of accusation against him so that he may prepare a responsive defense; and

(2) Avoid the possibility that "confusion as to the basis of the verdict may subject the defendant to double jeopardy in the vent of a subsequent prosecution." United States v. Leggett, 312 F.2d 566, 570 (4th Cir. 1962).

In United States v. UCO Oil Company, 546 F.2d 833 (9th Cir. 1976), the Court proposed a four-step method for deciding whethe a count was duplicitous: (1) the language in the statute and the count in the indictment must first be analyzed to determine whether Congress or the prosecutor has identified a

single result or means, or whether one has included different offenses: (2) legislative history must be looked at to determine offenses under a single statute; (3) the nature of the proscribed conduct itself must be scrutinized to determine whether they are conceptually different; and (4) the appropriatness of multiple punishment from the conduct charged in the indictment must be considered.

Applying this method of analysis to the alien transportation act, the first steps reveals duplicity on its face, as do the next three (3) steps.

In the case at bar, the Government could have charged the Petitioner with a separate Count for each alien transported. Vega-Murillo v. United States, 247 F.2d 735 (9th Cir. 1957). It chose, rather, to combine larger numbers of aliens into one Count. Such procedure not only is improper but severely prejudicial under the facts of the case at bar. The Government did not name any of the aliens allegedly transported by the

Petitioner. Should an alien now come forth and claim that the Petitioner willfully and knowingly transported him within the period encompassed by this indictment, what is to stop the Government from indicting the Petitioner again, and thereby subjecting Petitioner to double jeopardy. The testimony of the Government's witnesses at trial was so confused and contradictory as to when the loads were transported, that one, even after several readings, knows not who went where when.

Furthermore, the Petitioner's right under the Sixth Amendment to notice of the nature and cause of the accusation against him was denied by the Trial Court. Again, one of the bases for the above is so that the defendant can prepare a responsive defense.

The Petitioner timely filed a Motion for Bill of Particulars (CR 128) requesting particulars of the government so that he might more adequately prepare his defense and so as to be adequately apprised of the nature

and scope of the accusation against his. See United States v. Schembari, 484 F.2d 931 (4th Cir. 1973). This Motion was denied. (CR 157).

None of the Government's witnesses' testimony was specific as to dates aliens were transported. John Henry testified his times could be off as much as two weeks (RT 225-226), as did Anderson (RT 273), the two main witnesses against the Petitioner. The real problem arises when one attempts to compare one witness' testimony with the others: total confusion results making it totally impossible to defend against the accusations. This is further complicated by the fact that the Government presented evidence of over thirty (30) different loads when only five were charged. The Petitioner, at this time knows he stands convicted of three substantive Counts, but he knows not on whose testimony, for which alien, or for how many. Such is prejudicial. See: United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976); Russell v.

United States, 369 U.S. 749 (1962).

The Petitioner respectfully submits that based upon the inability of the Government's witnesses to testify to specific dates, times and places on which some thirty (30) loads of aliens were transported, when the indictment charged only five, due process requires that his convictions be reversed.

III

DID THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERR IN NOT FINDING THAT THE PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BASED ON THE ASSERTION THAT THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE PETITIONER WAS INVOLVED IN A CONSPIRACY AND THAT THE INDIVIDUALS TRANSPORTED WERE ALIENS?

The Petitioner would submit that the record herein demonstrates that an insufficient quantum of evidence was introduced during trial regarding the alienage of the individuals transported and whether the Petitioner

was involved in a conspiracy with the other defendants. United States v. Spanos, 462 F.2d 1012 (9th Cir. 1972). The Petitioner's Motions for Judgment of Acquital were made pursuant to Rule 29, Federal Rules of Criminal Procedure, both before and after the jury had returned a verdict. (RT 527-534, 539). Said Motions were denied by the Trial Court.

It is quite obvious that in order to convict a defendant under 8 U.S.C. § 1325(a)(2), the government must prove beyond a reasonable doubt that:

> "(1) Appellant transported an alien within the United States, (2) the alien had not been lawfully admitted or was not lawfully entitled to enter, (3) this was known to Appellant, (4) he knew that alien's last entry was within three years, and (5) Appellant acted willfully in furtherance of the alien's violation of the law." United States v. Gonzalez-Hernandez, 524 F.2d 1353 at 1354 (9th Cir. 1976).

While the Petitioner agrees with the Government that alienage can be established by circumstantial evidence and by testimony of co-conspirators, no competent evidence of alienage was presented by Government witnesses

against the Petitioner. All of the evidence of alienage was presented during testimony against DODSON, MORGAN and ZAVALA and not against the Petitioner.

Furthermore, the Government did not prove beyond a reasonable doubt, much less produce evidence of the existance of a conspiracy linking the Petitioner with the other Defendants. None of the Government's witnesses testified that both the Petitioner and ZAVALA or MORGAN or DODSON or EISENHART or ZURITA were ever involved in any combined criminal activity. The Government failed totally to connect the Petitioner with any of the co-defendants in any criminal activity. This matter is discussed more fully in section II(3) of this document.

In light of the foregoing, as a matter of law, the evidence tying the Petitioner to a conspiracy is speculative, at best and there was simply no evidence presented against the Petitioner establishing the alienage of those who were transported. That being the case,

the Petitioner respectfully submits that the Government's proof against him was insufficient to sustain a conviction. United States v. Camacho-Davalos, 468 F.2d 1382 (9th Cir. 1920).

VI

SHOULD THE NINTH CIRCUIT COURT OF APPEALS HAVE CONCLUDED THAT THE PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY THE GOVERNMENT'S UNILATERAL ACTION OF RETURNING EYE WITNESS ALIENS TO MEXICO?

Count I of the indictment charges an overall conspiracy to transport illegal aliens. This Count sets forth two (2) overt acts, the second of which involves a load of aliens which was apprehended and released by the Government. This overt act was the subject of Count VII. All of the witnesses' testimony did indicate that the Petitioner did not enter the picture until sometime after the first overt act occurred, as alleged in the indictment. This load was seized on April

29, 1979, and when the greater portion of aliens was released a day latter (RT 424), the Government was aware that the Petitioner has posted bail for the driver of the load vehicle. (RT 422).

Count V was the only Count for which the Petitioner was convicted which did not involve a load of aliens which had been seized and later released. Count VI alleged that the Petitioner illegally transported thirty-six (36) aliens. Allegedly, Anderson and Cole were the drivers who actually transported this load and were apprehended in Phoenix, Arizona. At the time they were arrested and the aliens seized, the Government was fully aware of the Petitioner and his alleged organization. (RT 416, 462, 472).

In the instant case, the Government knew of the Petitioner as early as July 16, 1978, when F.B.I. informer Robert Martin, who had been instrumental in one of the Petitioner's loads being apprehended in Chicago, Illinois, was released by Federal I.N.S. authorities.

It was Martin who informed Governmental witness Agent Lough of the details of the so-called ROBERTS organization. The Petitioner's telephone tolls had been subpoenaed from Mountain Bell as early as July 27, 1978. (RT 462-464). Lough testified he had begun routine surveillance of the Petitioner's house in December, 1978. (RT 444).

Although the above testimony of Agent Lough was given out of the presence of the jury, Agent Lough did testify that the first time he had heard of the Petitioner's name was on February 7, 1979, (RT 416), when he interviewed Robert Martin. However, this testimony was given before the jury.

It becomes clear from the foregoing that the Petitioner was well known to I.N.S. as an "alien smuggler" prior to the Government's release of any of the aliens in the loads with which he is charged. Yet, the Government did nothing to preserve the aliens' presence for him; thus violating his Fifth and Sixth Amendment rights.

Based on the foregoing, the Petitioner would respectfully submit that Agent Lough was untruthful and attempted to minimize his knowledge of the Petitioner, so as to minimize the Petitioner's chances of showing prejudice by the Government's release of the aliens.

That the Petitioner was severely prejudiced in not having the aliens present for trail cannot be questioned:

(1) Through the aliens, the Petitioner could have shown that the "walkers" or guides who worked for him were not the same as those for the ZAVALA organization, thus discrediting Government witnesses such as John Henry, Anderson and Cole;

(2) The released aliens would have been able to prove that the ZAVALA organization was not tied to the Petitioner in any essential way and thus proving multiple conspiracies;

(3) The Petitioner would have been able to prove through the missing aliens that he at no time drove down to the border area, as

was testified to by John Henry (RT 221) to pick up a load of aliens;

(4) The Petitioner would have been able to corroborate John Henry's testimony (RT 227) that the people in the drop houses in Chicago and Idaho were not the same as those for the ZAVALA organization.

The right to compulsory process, as guaranteed by the Sixth Amendment, is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967). The right to offer testimony of witnesses and to compel their attendance, if necessary, is, in plain terms, the right to present a defense. It is, for this reason, that the Petitioner now requests this Court to reverse his conviction on those Counts, wherein the Government knowing or having reason to believe in his involvement in those Counts, deported the aliens to Mexico; thus making them unavailable. In so urging this Court, the Petitioner relies on the following cases: United States v. Mendez-Rodriquez, 450 P.2d 1 (9th Cir.

1971); United States v. Avila-Dominquez, 610 F.2d 1266 (5th Cir. 1980).

In the instant case, the Government did not have to release the aliens. It could have followed the examples set in United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974). United States v. Verduzco-Macias, 462 F.2d 105 (9th Cir. 1972).

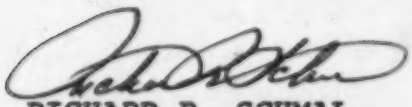
NOTICE OF JOINDER

Petitioner hereby joins in and adapts each and every issue and argument presented by Petitioners IDULFO ZAVALA-PINZANO and BILL GENE MORGAN in their respective Petitions For Certiorary which have or will be filed pursuant to U.S. Sup. Ct. Rule 19.4, 28 U.S.C.A.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully asks that a writ of certiorari issue to review the judgment and decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	FILED
	)	March 30, 1981
Plaintiff-Appellee,	)	RICHARD H. DEANE
	)	Clerk, U.S. Court
v.	)	of Appeals
	)	
IDULFO ZAVALA-PIZANO,	)	NOS. 80-1264
BILL GENE MORGAN,	)	80-1265
TRUMAN ROBERTS, and	)	80-1266
GERALD WAYNE DODSON,	)	80-1267
	)	
Defendants-Appellants.	)	MEMORANDUM
	)	

Appeal from the United States District Court for the District of Arizona
The Honorable Thomas F. Murphy, Presiding
Argued and Submitted December 9, 1980

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge.

Appellants in this consolidated appeal were indicted by a federal grand jury on one count of cinspiracy to transport illegal aliens, in violation of 18 U.S.C. § 371, and from one to six counts of transportation of illegal aliens, in violation of 8 U.S.C. § 1324(a)(2). Following a jury trail, all appellants were convicted on the conspiracy count and at least one trans-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

portation count. Appellants raise numerous issues on appeal, most of which are common to two or more parties.

Appellants argue that the evidence produced by the Government at trial is insufficient to support their convictions on the transportation counts. In reviewing the sufficiency of the evidence to support a conviction, the reviewing court views "the evidence in the light most favorable to the Government. The verdict of the jury will be upheld if there was relevant evidence from which the jury could reasonably have found the defendant guilty beyond a reasonable doubt." United States v. Friedman, 593 F.2d 109, 115 (9th Cir. 1979) (citations omitted). Several persons who had participated in the smuggling operation gave testimony regarding the persons who were transported and the details of the trips which were made and money that was paid. We hold that there was sufficient evidence to support the findings of the jury.

Appellants next argue that their convictions

should be reversed because the trail court improperly instructed the jury. While the instructions were not given in the exact form recommended by the parties, we hold that the instructions as given were adequate. The trial court has "substantial latitude in tailoring [jury] instructions." United States v. James, 576 F.2d 223, 226 (9th Cir. 1978). Challenges to the "language or formulation of the charge are reversible only for an abuse of discretion." Id. at 227. There was no abuse of discretion here.

Appellants argue that their convictions should be reversed as a result of the duplicitous nature of the indictment under which they were charged. The relevant statute, 8 U.S.C. § 1324 (a)(2), provides that a five-year sentence may be imposed for each alien transported. Appellants assert that the indictment must thus contain a separate count for each alien, rather than charge the transportation of numerous aliens in each count. None of the appellants received more than a

five-year sentence on any one count, however. They were thus not prejudiced by the form of the indictment.

Appellants also attack the indictment for lack of specificity. As a result of the conspiracy count, appellants had to be prepared to defend against charges that smuggling trips took place during the entire time period in question. They were thus not sufficiently prejudiced by any lack of specificity in the indictment to require reversal.

Appellants assert that the trial judge committed reversible error by commenting on the veracity of a government witness, by allowing witnesses to describe the persons transported as "aliens," and by refusing to permit sidebar conferences. A review of the record reveals that the trial judge was not in reality commenting on the witness's veracity. Rather, he was attempting to expedite cross-examination by pointing out that the questioning was repetitive. The use of the word "aliens" did not prejudice appellants sufficiently to require

reversal. We note that the witnesses did not call the persons transported "illegal aliens." It was not improper for the judge to refuse sidebar conferences under the circumstances.

Finally, appellants assert that they were denied due process by the Government's action in returning potential witnesses to Mexico. See United States v. Mendez-Rodriquez, 450 F.2d 1 (9th Cir. 1971). The trial court held a hearing on this issue below and found that the release of the aliens who returned to Mexico was not improper. We agree; the defendants in this case had not been charged with any offense at the time of the release.

The remaining issues raised by appellants are without merit.

The convictions are AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	FILED
	)	June 16, 1981
Plaintiff-Appellee,	)	RICHARD H. DEANE
	)	Clerk, U.S. Court
v.	)	of Appeals
	)	
IDULFO ZAVALA-PIZANO,	)	NOS. 80-1264
BILL GENE MORGAN,	)	80-1265
TRUMAN ROBERTS, and	)	80-1266
GERALD WAYNE DODSON,	)	80-1267
	)	
Defendants-Appellants.	)	ORDER
	)	

Appeal from the United States District Court for the District of Arizona

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearings. Judge Hug and Canby have voted to reject the suggestions for their rehearings en banc and Judge East recommends rejection of their suggestions.

The full court has been advised of the en banc suggestions and no judge of the court has requested a vote on them. Fed. R. App. P.35(b).

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The petitions for rehearings are denied and the suggestions for rehearings en banc are rejected.

No.

IN THE SUPREME COURT OF THE UNITED STATES

TRUMAN ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF MAILING

Pursuant to U.S. Sup. Ct. Rule 28.5(b), the undersigned hereby certifies that on the day of July, 1981, he has caused to be deposited three (3) copies of Petitioner Truman Roberts Petition For Certiorari in the above captioned cause in the United States Mail, with first-class postage prepaid and addressed to the following in accordance with U.S. Sup. Ct. Rule 28.3. and 28.4(a):

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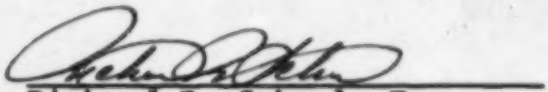
Dated this 24th day of July, 1981.

RICHARD R. SCHMAL, LTD.



Richard R. Schmal, Esq.
Attorney for Petitioner

Opposition

Office - Supreme Court, U.S.
FILED
OCT 15 1981
ALEXANDER L. STEVAS
CLERK

Nos. 81-204, 81-217 and 81-274

In the Supreme Court of the United States

OCTOBER TERM, 1981

TRUMAN ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

BILL GENE MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

IDULFO ZAVALA-PIZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTIONS PRESENTED

1. Whether petitioners' rights to due process and compulsory process were violated when illegal alien witnesses were deported from the country many months before any of the petitioners were indicted.

2. Whether the district court's conduct at trial, including not allowing side-bar conferences, making occasional disparaging remarks about counsel, and cutting off lengthy examinations, denied petitioners a fair trial.

3. Whether the indictment informed petitioners adequately of the charges against them.

4. Whether the district court abused its discretion by not using the exact language of the jury instructions submitted by petitioners.

5. Whether the evidence was sufficient to sustain petitioners' convictions.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-204

TRUMAN ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-217

BILL GENE MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-274

IDULFO ZAVALA-PIZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3)[1] is unreported.

[1] "Pet. App." refers to the appendix to the petition in No. 81-204.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1981. Petitions for rehearing were denied on June 16, 1981 (Pet. App. A-4). The petition for a writ of certiorari in No. 81-274 was filed on July 24, 1981. The petitions for a writ of certiorari in Nos. 81-204 and 81-217 were filed on July 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, all three petitioners were convicted of conspiracy to transport illegal aliens, in violation of 18 U.S.C. 371 (Count I).[2] Additionally, petitioner Morgan was convicted on three counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2) (Counts II, III and IV); petitioner Roberts was also convicted on three counts of transporting illegal aliens (Counts V, VI and VII); and petitioner Zavala was convicted on one count of transporting illegal aliens (Count II). Petitioners Morgan and Roberts were sentenced to concurrent terms of five years' imprisonment on each count of transporting illegal aliens and fined $10,000 on the conspiracy count. Petitioner Zavala was sentenced to consecutive terms of five years' imprisonment on Counts I and II, and fined $10,000 on Count I. The court of appeals affirmed (Pet. App. A-1 to A-3).

1. The pertinent facts relating to the various counts in the indictment, as developed during the

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[2] Co-defendant Dodson was also convicted on Counts I and II, and his convictions were upheld by the court of appeals (Pet. App. A-1 to A-3). However, he has not sought review in this Court.

trial, are as follows: From March 1978 to June 1979, petitioners and others were involved in transporting large numbers of illegal aliens from the Mexico-Arizona border to various locations in the United States, including cities in Illinois, Colorado, and Idaho. During this period, there were approximately 24 trips involving between nine and 34 aliens per trip (Tr. 45-47, 56-65, 90-108, 164-180, 180-188, 188-191, 191-197, 203-207, 208-214, 214-217, 218-220, 220-222, 251-257, 259-261, 310-313).

The transportation process was similar for each trip. Petitioner Zavala's brother would select Mexican nationals, whom he knew well and who wanted to enter the United States, to smuggle across the border with the help of "walkers" whom he hired (Tr. 49-54, 192-193). The smuggled aliens would walk to a predetermined destination near Nogales, Arizona and would be picked up by drivers in motor homes hired by petitioners Zavala, Morgan, or Roberts (Tr. 5-8, 13-16, 51-53). Actually, two drivers were sent, one in the motor home and one in a passenger car (Tr. 28-30, 108-172). All of the aliens would be put in the back of the motor home and taken to Phoenix, where they would be given food and water and where petitioner Zavala usually would collect money for the first part of the trip (Tr. 16-20, 25, 27, 34, 43).

The aliens then would be transported in the motor home from Phoenix to a location in Colorado, Idaho or Illinois. The aliens were never allowed out of the motor home prior to their arrival at the final destination (Tr. 59, 105). Petitioner Morgan frequently met the drivers at the drophouse in Chicago and paid their expenses to get back to Phoenix (Tr. 63-64, 176-178, 196). Once back in Phoenix the primary driver was paid between $600 and $1,200 by

petitioners Morgan or Roberts, to be split with the other driver (Tr. 178-179, 190-191, 214, 219-220, 314).

Three of the substantive counts (III, VI and VII) resulted from arrests of the drivers and the aliens. In June 1978, two drivers, who had been hired by petitioner Morgan, were stopped in Nebraska attempting to transport 22 illegal aliens from Arizona to Illinois (Tr. 91, 102, 104). All 22 of these aliens were returned to Mexico on September 14, 1978 (Tr. 400).

In March 1979, two different drivers were hired by petitioner Roberts to pick up approximately 23 people near Nogales and take them to Idaho (Tr. 265). When the drivers stopped in Phoenix to let two passengers out, they and the aliens were arrested by agents of the Immigration and Naturalization Service (Tr. 267). Some of these aliens were released back into Mexico on April 5, 1979, and the rest on April 25, 1979 (Tr. 411-412, 493).[3]

In April 1979, a driver of one of the motor homes was arrested near the Mexican border in Arizona along with 29 aliens who had been in the back of the vehicle (Tr. 383-387). The motor home had been rented on behalf of petitioner Roberts by another driver, who had not been able to make the trip (Tr. 220-222). Twenty-six of these aliens were released back into Mexico on April 30 or May 1 with the consent of the driver who had been arrested. The rest were released on August 10, 1979, by court order and over the government's objection (Tr. 474-476).

The other three counts involved "successful" efforts to transport illegal aliens. Count II involved a trip in March 1978 from Nogales, Arizona

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[3] Videotaped depositions were taken of the aliens who were retained until April 25 (Tr. 493).

through Phoenix to Rupert, Idaho. The government's evidence at trial was supplied by William Danielson, a motor home salesman, who had been a part of the conspiracy. He had agreed to rent motor homes to petitioner Zavala for the purpose of transporting illegal aliens (Tr. 6-7). At the end of March he rented a motor home to a co-conspirator, Fleminger, after petitioner Zavala paid the deposit. He was told that she went to Nogales and picked up about 29 aliens and took them to Rupert, Idaho (Tr. 15-18). Danielson witnessed Fleminger count out $8,700 for the aliens she had transported (Tr. 17).

Count IV also involved Danielson, who was approached by petitioner Morgan about renting two motor homes (Tr. 53). On September 23, 1978, because of a mix-up with one of the drivers, Danielson himself accompanied a driver with a load of about 20 aliens (Tr. 59). They went to Chicago and there met petitioner Morgan, who paid their expenses back (Tr. 61, 63).

Finally, the events in Count V occurred on March 19, 1979, when two drivers transported either 20 or 22 aliens from Phoenix to Idaho (Tr. 259-261, 272). One of the drivers testified that he had been hired and paid by petitioner Roberts (Tr. 259-261).

Prior to trial all three petitioners moved to dismiss their indictments on the ground that the deportation of the aliens in September 1978, April 1979 and August 1979 deprived them of potential witnesses in violation of the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment. The district court held a hearing on the motions. The government submitted testimony from an INS agent indicating that it was not until some of the co-conspirators testified before the grand jury in December 1979, fully five months

after the last alien was deported, that the government had enough information to implicate petitioners as participants in the operation to transport illegal aliens (Tr. 492-493).

The district court denied the motions. The court found first that none of the deported aliens could have had information relevant to Counts I, II, IV and V. With regard to the other counts, the court found as a fact that "the unilateral action of the government was at a time when * * * the defendants indicted were not known to have committed the acts charged in the indictment" (Tr. 507).

2. The court of appeals affirmed petitioners' convictions in a brief memorandum (Pet. App. A-1 to A-3). It rejected numerous claims of procedural error asserted by petitioners and found that the evidence supported the district court's conclusion that the government deported all of the aliens prior to having any knowledge of petitioners' involvement in the crimes charged in the indictment.

ARGUMENT

1. The only issue raised in the petitions that has even arguable significance beyond this case is petitioners' claim that their rights were violated by the deportation of various possible alien witnesses. The United States has recently sought review in two cases, *United States* v. *Valenzuela-Bernal*, No. 81-450, and *United States* v. *Marquez-Amaya*, No. 81-471,[4] involving the Ninth Circuit's rule, first announced in *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), that under certain circumstances the deportation of alien witnesses prior to

[4] Copies of our petitions in these two cases are being sent to counsel for the petitioners in this case.

trial violates a defendant's Fifth and Sixth Amendments rights. The proper disposition of this case, however, is in no way dependent on how the Court disposes of our petitions in *Valenzuela-Bernal* and *Marquez-Amaya*.

Under even the broadest interpretation of the defendant's rights to due process and compulsory process, there must be a showing that the government had some reason to know that the deported aliens might be potential witnesses for the defendants. See *United States* v. *Tsutagawa*, 500 F.2d 420, 422 (9th Cir. 1974). See also *United States* v. *Martinez-Morales*, 632 F.2d 112, 116 (9th Cir. 1980). Indeed, petitioners do not question this requirement. They simply argue that the government had reason to know of the full extent of their criminal activity before the indictment was issued. It is difficult to square petitioners' assertion with the fact that while the aliens were deported in September 1978, April 1979 and August 1979, the grand jury was not convened until December 1979, and the indictment was not issued until January 1980. In any event, the district court expressly rejected petitioners' factual argument, and its finding was upheld by the court of appeals as fully supported by the record. Further review of the issue therefore is unwarranted.

2. Petitioners individually and collectively raise a large number of additional issues that were properly disposed of by the court of appeals and that do not warrant further review by this Court. First, they claim (81-204 Pet. 12-20; 81-274 Pet. 44-48) that their trial was unfair because the district court commented favorably on the veracity of the government's witnesses, allowed witnesses to describe the persons transported as "aliens," criticized defense counsel on occasion, and refused to allow side-bar conferences

on legal issues. The court of appeals held that petitioners were not prejudiced by any of these actions (Pet. App. A-3), and there is no reason to review that finding.[5]

3. Petitioners next argue (81-204 Pet. 24-37; 81-217 Pet. 7-8; 81-274 Pet. 26-29, 50-51) that the district court erred in the manner it instructed the jury as to considering each count separately, considering each defendant separately, the proper burden of proof, testimony of immunized witnesses, absent witnesses, judging the evidence, and knowledge as an element of the offense charged. Petitioners' complaint is that the instructions were not given in the exact form in which they were submitted to the court. The court of appeals properly held that challenges to the form of the instruction are " 'reversible only for an abuse of discretion' " and that "[t]here was no abuse of discretion here" (Pet. App. A-2). There is no reason to review that holding.

4. Petitioners next challenge (81-204 Pet. 46-52; 81-217 Pet. 8-12; 81-274 Pet. 31-44, 55-60) the form of the indictment, claiming that it was duplicitous because groups of illegal aliens were lumped in single counts and that it lacked specificity, thereby denying them fair notice of the charges against them. The court of appeals correctly held that petitioners were not substantially prejudiced by the form of the indictment in this case (Pet. App. A-2 to A-3), and indeed it is difficult to see how it could have

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[5] Petitioner Roberts also claims (Pet. 20-23) that he was prejudiced by the court's decision to read a stipulation between the government and a co-defendant to the jury. The court of appeals did not discuss this point specifically—no doubt because petitioner did not object at trial and because it was made clear to the jury that the stipulation applied to only one of the defendants.

benefited petitioners to have had each count multiplied into 20 or more separate counts.

5. Petitioners argue (81-204 Pet. 52-55; 81-274 Pet. 25-26, 49) that there was insufficient evidence of the alienage of the persons transported to support their convictions. The court of appeals stated that "[s]everal persons who had participated in the smuggling operation gave testimony regarding the persons who were transported and the details of the trips * * *" (Pet. App. A-2). It then correctly concluded that this "was sufficient evidence to support the finding of the jury" (*ibid.*).[6]

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[6] Two other minor issues are raised by individual petitioners. Petitioner Roberts claims (81-204 Pet. 39-46) that two separate conspiracies were proved at trial—one headed by petitioner Zavala and the other run by himself—and that the failure to grant him a separate trial therefore was unfair. The court of appeals disposed of this claim without comment, no doubt because the evidence showed clearly that throughout the period covered by the indictment the same drivers went to the pick-up points on the Arizona border and to the same drop-off points in Illinois and Idaho using the same *modus operandi*. While this evidence could reflect mere coincidence, the jury, after being properly instructed on conspiracy, concluded that the evidence proved the existence of a single overall agreement. That factual determination does not warrant review by this Court.

Petitioner Zavala claims (81-274 Pet. 29-30, 51-53) that his right to confront witnesses was denied when the district court refused to allow him to cross-examine one of the government's witnesses with regard to cooperation he had supplied to the prosecutor in other, unrelated cases of transporting illegal aliens. The court of appeals also declined to comment on this issue. Obviously, the decision whether to allow an examination into details of unrelated activities is a matter firmly committed to the discretion of the district court. Moreover, petitioner was able to impeach the witness

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

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on the basis of his cooperation with the government in this and other cases. Details would have added nothing significant to the point petitioner had already made.

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